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[ORIGINAL CIVIL JURISDICTION]

BURTON, J.

December, 18, 1935.

REX v. J. B. WEISS.

[SINGAPORE MAGISTRATE'S APPEAL No. 37 of 1935]

Municipal Ordinance (Cap. 133), s. 144, sub-s. 9 and s. 392—Deviation from approved plan—Time of completion of offence—Limitation.

The owner of a dwelling house submitted a plan for the installation of a water-carriage system of sanitation with a private purification plant. There was included in the plan an extension of the installation to the servants' quarters which were a separate building. Both buildings had been completed two years earlier in accordance with plans approved by the Municipal Commissioners. The sanitary installation for the dwelling house itself was completed in accordance with the new plan but the extension of such sanitary installation to the servants' quarters was not proceeded with. More than a year after this work had been completed the Municipal Building Surveyor caused a notice to be served upon the owner requiring him to instal the water carriage system in the servants' quarters. On the owner declining to comply with the notice he was prosecuted on a charge of having a building used as a boys' quarters which was not according to the plan or specification approved by the Singapore Municipal Commissioners. The owner was acquitted and against the acquittal the prosecution appealed.

Held, confirming the acquittal, that a deviation within the meaning of s. 140, sub-s. 9 (b) (now s. 144, sub-s. 9 (b)) of the Municipal Ordinance had occurred at the time when the installation in the first building was completed and when the accused had stated categorically his intention of not making the connection with the servants' quarters, but that this was not a continuing offence but a single offence, which was complete when the intention of the accused to deviate was manifested by the overt act of ceasing work on the installation, and that therefore the owner was protected by s. 381 (now s. 392) of the Ordinance.

MAGISTRATE'S APPEAL.

Williamson for the Municipal Commissioners.

Walters for the respondent.

Cur. Adv. Vult.

BURTON, J.—In this case the respondent was prosecuted for and acquitted on the charge of having a building used as boys' quarters erected at No. 25 Ridout Road which was not according to the plan or specification approved. The charge was incorrectly drawn, as it should have been laid under s. 140, sub-s. 9(b) of Ordinance No. 135 (Municipal) for deviating from an approved plan. But although this irregularity was commented on, no point could be made of it, because the accused was in no way prejudiced.

The trial was conducted very irregularly. only one witness was called for the Crown and no attempt was made to prove a bundle of correspondence which was "put in by consent"; so that if the evidence is read up to the close of the prosecution case, no offence was proved against the accused, there was no proof even that he had failed to follow the plan; and the Magistrate ought to have acquitted the accused without calling on the defence. But he did not do so and the accused and his witnesses fortunately supplied by their own evidence some of the omissions of the prosecution.

I think the principle is clear that if a new trial is to be granted it must be granted because the Magistrate was wrong to acquit on the facts proved. The Crown must not be given the opportunity to make out a new case or repair its own omissions. I say this because Mr. Williamson relied on Mr. Weiss's letter of 9th December 1934 as evidence of his final decision to deviate from the plan. But beyond being included in the bundle of agreed correspondence, no proof of this letter at all was given and it was not even put to the accused in cross-examination.

It is now clear on the record that the accused did not complete the approved plan, but I think that on the evidence before the Magistrate the date of the deviation was the date at the end of December 1933 when the installation was finished, because in a letter of 3rd October Mr. Weiss had already stated categorically his intention of not making the connection with the servants' quarters. The Magistrate out of an excess of caution has put the date as late as April 1934. But that makes no difference. I accept the principle enunciated by him that the deviation was complete as soon as the accused had formed a definite intention to do nothing further towards the completion of the installation and work had accordingly ceased.

Mr. Walters argued stronglv that to omit part of a plan is not a deviation in the correct sense of the word. But there is no authority on the subject and after consideration I think that this failure to complete the installation is a deviation from the approved plan.

The Magistrate held therefore that although a deviation had taken place, the accused was protected by s. 381 of the Ordinance. And this point was met by Mr. Williamson with the argument that the offence is a continuing offence, and he relied on the words of the Ordinance in s. 140 which makes the accused liable to "a dailv fine of ten dollars for every day on which the offence is continued after conviction." It is easv to distinguish the case of the *Metropolitan Board of Works* v. *Anthony*, 54 L.J.M.C. 39, which Mr. Williamson cited, because the Statute, 45 Vict. c. 14, s. 13, in terms makes the offence a continuing one. But Mr. Williamson argues that s. 140 also does this by providing inferentially at any

rate that the offence shall continue up to the date of conviction because it is further punishable if continued after conviction. But the case of *Hull* v. *The London County Council*, (1901) 1 Q.B. 580 seems to me to weigh very strongly against this. Hull was convicted of an offence against a section of the London Building Act 1894 forbidding projections beyond the general line of buildings in a street. The projection was a wooden case attached to the external wall of the building by iron brackets and used as an advertisement sign. Bruce J. giving the judgment of a Divisional Court said at p. 589:—

> "Further as to point raised by the case whether the prosecution of the alleged offence is barred under s. 11 of the Summary Jurisdiction Act 1848 by lapse of time, we think it is. If any offence was committed it was, we think, complete on June 20th 1899—the date on which the said sign was completely affixed to the premises."

Similarly in *Marshall* v. *Smith*, 8 C.P. 416, the court pointed out that while continuing to build might be a continuing offence, the failure to destroy after the building was completed could not.

I think therefore that the deviation from the plan was a single offence which was complete when the intention of the accused to deviate was manifested by the overt act of ceasing work on the installation and that this is not a continuing offence so as to defeat the operation of s. 381. I think therefore that the Magistrate was right to acquit and I dismiss this appeal.

Mr. Walters has asked for costs, but I think I am bound by my decision in the case of *R.* v. *Mohamed Sudin*, 1935 S.S.L.R. 309 and that this appeal is clearly neither vexatious nor frivolous. I refuse therefore to award costs to Respondent.

Appeal dismissed.

Solicitors for Appellant—*Drew & Napier.*

Solicitors for Respondent—*Allen & Gledhill.*

[APPELLATE CRIMINAL JURISDICTION]

McELWAINE, C.J.

January 29, 1938.

REX v. S. EBATA.

[SINGAPORE MAGISTRATE'S APPEAL No. 101 of 1937].

Merchandise Marks Ordinance (Cap. 157), s. 12—Importing goods marked with a counterfeit trade mark.

In 1927 a Singapore firm ordered goods from a Japanese manufacturer and later in the year cases of goods consigned by the manufacturer for the importer arrived in Singapore. The goods which arrived were 200 dozens men's socks which had not been ordered by the importer. This appeared on the invoice which was checked by the importer but he gave instructions to take delivery of all the goods. Subsequently it was found that these socks bore a trade mark which was the trade mark of an English hosiery firm in breach of the Merchandise Marks Ordinance. The District Judge convicted the appellant under s. 12 of the Merchandise Marks Ordinance and he appealed from the conviction.

Held, that by accepting the draft and accepting delivery of the goods which he knew he had not ordered the importer had ratified the action of the manufacturer and accepted the consignment and so became an importer.

Also held, that, though he could not take any reasonable precautions within subsection (a) of section 12, an importer, even where he does not obtain possession of the goods bearing the infringing mark, has no defence under subsection (c) of that section.

MAGISTRATE'S APPEAL.

Dr. Withers Payne for appellant.

Storr, Crown Counsel, for the respondent.

The facts and arguments appear sufficiently from the judgment.

MCELWAINE, C.J.—The appellant was convicted on the following charge:—

> "That he, on or about 25th October, 1937 at Singapore did import goods, to wit, cotton socks, to which a counterfeit trade mark had been applied and thereby committed an offence punishable under s. 12 of the Merchandise Marks Ordinance (Chapter 151)."

The facts alleged in the evidence are shortly as follows:—About the middle of July 1937, Ebata & Co., ordered goods from the travelling representative of Matsuoka & Co., of Tokyo. A copy of the order in Japanese characters and English figures was produced by the appellant. A translation of the document was not put in. The goods total Yen 4,997.36. It was stated that the socks were not ordered. I have had the copy of the order which was exhibited by the accused translated. It shews no order for socks.

On 25th or 26th October cases of goods consigned by Matsuoka & Co. to Ebata & Co. arrived in Singapore in the S.S. "Celebes Maru" and were brought to the Customs examination shed. Who brought them from the ship to the shed does not appear.

On 26th October appellant received from the bank a draft and an invoice exhibit "C." This invoice is in English throughout. It totals Y.2.668.48. Some of the items tally with those in the order, some goods in the order are not included, but some goods not in the order were included. Among the latter are two hundred dozen "Men's cotton and Ravon socks" costing Y. 640. No mention of any trade mark appears in the invoice and I understand Crown Counsel to agree that there was no trade mark on the outside of the cases in which the socks were contained.

On obtaining the invoice appellant checked it with the order and found that the socks were not ordered. However he gave instructions to take delivery of all the cases. He had to take